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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 20 2000

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

[redacted]

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. After the director denied the petitioner's motion to reconsider, the petitioner appealed the decision to the Associate Commissioner for Examinations. The appeal was summarily dismissed after the petitioner failed to specifically identify any erroneous conclusion of law or statement of fact for the appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted and the previous decision of the director will be affirmed. The petition will be denied.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability as a supervising animator. The director determined the petitioner had not established that he qualifies for classification as an alien of extraordinary ability in the arts.

On appeal, counsel reiterates the petitioner's qualifications and asserts that the director's decision was incorrect. On motion, the petitioner submitted additional evidence for the record, including examples of the beneficiary's work product and letters of recommendation.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of

endeavor. 8 C.F.R. 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Service regulation at 8 C.F.R. 204.5(h)(3). These criteria will be addressed below. It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level.

This petition, filed on February 17, 1998, seeks to classify the beneficiary as an alien with extraordinary ability as a supervisory cartoonist. In the initial submission, the petitioner presented copies of the evidence originally submitted in support of the beneficiary's nonimmigrant petition for O-1 classification, as an alien of extraordinary achievement in the arts. Although counsel enumerated five claims with regard to the ten criteria listed at 8 C.F.R. 204.5(h)(3), counsel did not otherwise articulate an argument based on the evidence submitted. Instead, counsel simply stated that "[i]n reviewing the evidence attached to the submitted petition, it is easily apparent the [the beneficiary] more than meets the criteria as established by above referenced regulations . . . ."

The regulation at 8 C.F.R. 204.5(h)(3) outlines ten criteria, at least three of which must be satisfied for an alien to establish sustained national or international acclaim. In the letter accompanying the initial petition, counsel claimed that the petitioner has submitted evidence to meet five of the criteria.

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.*

Counsel claims that the beneficiary's membership in associations constitutes evidence of his extraordinary ability as an animator. Although the petitioner did not indicate which memberships this claim is based upon, the petitioner submitted evidence to demonstrate that the beneficiary is a member of the Motion Picture Screen Cartoonists labor union. The petitioner did not submit any other evidence of the beneficiary's memberships.

The petitioner submitted a letter from [redacted] president of the [redacted] Regarding the beneficiary's membership, the letter merely states: "I am pleased he wants to put down roots in Hollywood and has become a loyal member of our American union local." The petitioner did not submit copies of the beneficiary's membership card or other evidence of the beneficiary's membership. Neither counsel nor the petitioner claimed that membership in the [redacted]

guild requires outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields. As the petitioner did not submit evidence of the organization's membership requirements, the Service may not determine whether the union is open to any working animator, regardless of ability, or whether the organization requires outstanding achievements of their members.

As the petitioner did not submit evidence to establish the membership requirements or whether the beneficiary was judged by national or international experts in consideration of his membership, this measure of eligibility has not been established. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The petitioner has not submitted any evidence which could be considered "published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field."

The petitioner submitted copies of numerous newspaper and magazine articles from major newspapers and magazines. All of the articles are reviews of animated movies in which the beneficiary participated as an animator, with no attention focused on the beneficiary himself. On motion, the petitioner submitted a copy of an article from the "Hollywood Reporter," dated [redacted] which features a photograph of the beneficiary. The article is titled [redacted] Although the article features a photograph of the beneficiary, the article does not mention the beneficiary or feature the beneficiary's work. Finally, the petitioner submitted an advertisement from "USA Today" for the movie [redacted]" which purportedly features the animated work of the beneficiary. However, it is noted that the advertisement is not credited to the beneficiary as his work.

As the published materials are solely about the movies and animated productions, the submitted articles do not constitute published materials "about the alien" as specified in the regulation. The one article that contains a photograph of the beneficiary does not mention the beneficiary's name and does not refer to the beneficiary's work. It cannot be found that the beneficiary has

attracted the sustained attention of the national press or major media.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

To establish that the petitioner has performed in a leading or critical role for an organization of distinguished reputation, counsel asserts that the beneficiary has worked for numerous organizations which are recognized as leaders in the field of animation. Counsel insists that because the petitioner has been employed as an animator for organizations such as [redacted] (a division of Universal Pictures Ltd.), [redacted] and [redacted], the petitioner has performed leading positions for organizations of distinguished reputation.

In support of this claim, counsel for the petitioner directs the Service to the letter of [redacted], of the Motion Picture Screen Cartoonists. This letter simply asserts that the beneficiary has been employed by the previously named organizations. The letter further states that the organizations are leaders in the field of animation. The petitioner did not submit evidence, such as letters from the beneficiary's former employers, which would establish the beneficiary's role within these organizations or whether the position could be considered a leading or critical role. Furthermore, an assertion that an organization is a "leader of animation" does not establish that the organization has a distinguished reputation. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Regarding the claims of the petitioner regarding the beneficiary's current employment, the petitioner has not established that the beneficiary performs in a leading or critical role for the organization. The petitioner has submitted a letter from [redacted], co-founder of the petitioner and [redacted] stated that "[s]ince 1995, [the beneficiary] has made tremendous contributions as [redacted] on the animated features, [redacted] and [redacted]" (Emphasis in original.) Continuing, [redacted] stated:

> In my opinion, [the beneficiary] is an extraordinarily talented Supervising Animator. He has deservedly earned an international reputation for excellence and creativity. I believe that his participation at [redacted] enhances not only the work we're doing here, but contributes to the

overall success of the American animation business.

While [redacted] is widely recognized as a trend-setting executive within the entertainment industry, it must be noted that his testimony does not establish that the beneficiary performs a leading or critical role for the organization. Although counsel claims that the beneficiary's position is a critical or leading role, it is noted that there are numerous Supervising Animator positions within the animated movie productions. For example, in the production of [redacted] the credits list a total of ten Supervising Animator positions. In another production, [redacted] the beneficiary was listed in the credits as one of 27 animators.

Although the petitioner claims that these positions are important positions within the production of animated movies, the petitioner has not established that the positions are critical or leading roles within the petitioning organization, [redacted]. While the position of Supervisor Animator may be considered important to the production of an animated film, it has not been established that the beneficiary himself is performing a critical or leading role within the overall petitioning organization.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

As evidence of the claimed high salary, the petitioner submits copies of a contract for the beneficiary's initial term of employment with [redacted], rather than the current petitioner. This agreement called for the petitioner to be paid a contractual salary of approximately $100,800 per year, from October 11, 1993 to October 10, 1996. Although counsel claimed that the beneficiary would earn $117,000 per year, the petitioner did not submit evidence of the beneficiary's current salary with [redacted] It is noted that the petitioner did state on the immigrant petition that it was offering the beneficiary $2,250 per week, or approximately $108,000 per year.

To show that this level of remuneration is significantly high in comparison to others in his field, the petitioner submitted a copy of a letter from [redacted] of the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada (IATSE), which is dated April 15, 1997. This letter appears to have been previously submitted in support of the beneficiary's nonimmigrant petition. According to the letter and an associated chart, the "Local 839 IATSE Wage Minimums" for a journey-level "Staff Comic Strip Story person and/or Artist" was a total of $1,174.40 per week, or approximately $56,371.20 per year. Although the chart included an entry for "animators," this entry was left blank. The petitioner

did not explain why the labor union "wage minimum" should be considered as a reference in this comparison, rather than an "average wage" or other figure.

After the director noted in her decision that the salary chart did not represent the salary to be received by a supervising animator, counsel for the petitioner responded that a separate rate category does not exist for a supervising animator. In support of this assertion, counsel submitted a copy of the Department of Labor's Occupational Outlook Handbook, 1998-1999 edition, which states that the top ten percent of visual artists earn more than $43,000. Counsel declares that the beneficiary's field of employment is included within the "visual artist" category and that this entry should serve as a basis for comparison.

The petitioner has not established that the level of pay received by the beneficiary should be regarded as a high salary. Although the beneficiary is described as one of the top supervising animators in the industry, the petitioner has not submitted evidence which would compare the beneficiary's salary to that of other supervising animators. Although counsel claims that there is no separate rate category for supervising animators, the chart submitted for the record contains a blank entry for an animator. To equate the beneficiary's position with that of a "Staff Comic Strip Story Person and/or Artist" would constitute a false comparison. The petitioner bears the burden of establishing eligibility for the claimed benefit; merely stating that evidence is not available will not suffice.

Finally, as previously noted, the petitioner has submitted a copy of a news article from the "Hollywood Reporter," [redacted] titled [redacted] This article states that "[t]he average animator now earns about $125,000 annually." Based on this figure, the beneficiary of this petition earns less than the average animator working in his industry. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.*

In response to the director's decision, the petitioner claimed that the beneficiary's work has enjoyed great commercial success. In support of this claim, the petitioner submitted copies of the credits for two animated productions [redacted] and [redacted]

[redacted] which list the beneficiary as an animator. In addition, the petitioner submitted copies of box office gross receipts for the two films, which reflect that [redacted] made $11,249,665 and [redacted] earned $8,771,930. The petitioner also submitted evidence to establish that the film [redacted] grossed $50,863,742. Although the petitioner claims that the beneficiary was employed in other productions, no evidence was submitted to establish that the beneficiary was involved in these productions.

Counsel asserts that the box office receipts for these performances should be considered as evidence that the beneficiary is an alien of extraordinary ability. Counsel's argument is implausible. According to this reasoning, everyone involved in the production of these animated movies would be recognized as individuals of extraordinary ability and thereby satisfy this criterion. For this reason, the beneficiary's participation as one of many animators in an animated production will not satisfy this criterion based on the box office receipts received by the work as a whole. Eligibility in this case must rest on the petitioner's individual achievements, rather than relying primarily on the ambiguous presumption that the petitioner must be extraordinary because he participated as one of numerous animators in a production which was commercially successful.

Finally, as previously noted, the petitioner must show that "the alien's entry to the United States will substantially benefit prospectively the United States." *See* § 203(b)(1)(A)(iii) of the Act. Counsel for the petitioner asserts that the beneficiary will prospectively benefit the United States as follows: "1) from the amount of taxes [the beneficiary] will be paying on his substantial annual income; 2) United States workers will be employed on projects that in which [the beneficiary] will be serving as Supervising Animator; 3) ticket buyers will be paying the price of admission on films on which [the beneficiary] will have performed; 4) workers will be employed in movie houses in which his work will be showcased."

Counsel's assertion is not persuasive. Although employment creation would be a potential prospective national benefit, the petitioner's claims are speculative and not supported by any reasonable evidence. The petitioner has not demonstrated or even articulated a manner by which the beneficiary's employment would actually create employment among United States animators or movie house employees. Furthermore, the petitioner has not demonstrated that patrons will purchase theater tickets as a result of the beneficiary's participation on a project. The petitioner has not submitted any evidence to establish that the beneficiary has sustained national or international acclaim and is an actual "box office draw." Finally, the fact that the beneficiary would pay taxes on his salary is not so much a benefit to the United States,

as much as a certain obligation of the beneficiary. All of the beneficiary's claimed benefits are not dependent on or directly related to the beneficiary's employment. The petitioner's claims of prospective benefit to the United States are tenuous, speculative, and not supported by a modicum of evidence.

Throughout the petition, counsel for the petitioner asserted that the beneficiary's O-1 nonimmigrant status indicates that the beneficiary should be accorded the claimed immigrant classification. As explained by the director in her decision, the O-1 nonimmigrant classification requires a demonstration of a high level of accomplishment in the motion picture or television industry. 8 C.F.R. 214.2(o)(3)(ii). The immigrant classification which the petitioner currently seeks requires a much higher standard of evidence. As previously noted, an alien of extraordinary ability must establish sustained national or international acclaim and recognition in his or her field of expertise. 8 C.F.R. 204.5(h)(3). Accordingly, it does not necessarily follow that the beneficiary's nonimmigrant status entitles the beneficiary to an immigrant classification as an alien of extraordinary ability.

It must be emphasized that merely submitting evidence intended to address at least three of the criteria is not necessarily sufficient to demonstrate that the beneficiary has sustained national or international acclaim at the very highest level. The petitioner must clearly establish that he is within the small percentage at the very top of the field of animation.

For comparison, the Service has long held that athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *See* 56 Fed. Reg. 60897, 60899 (November 29, 1991). Likewise, it does not follow that all professional animators should necessarily qualify for an extraordinary ability immigrant visa. To do so would contravene Congress' intent that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor."

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim, is one of the small percentage who has risen to the very top of the field of endeavor, and that the alien's entry into the United States will substantially benefit prospectively the United States.

Review of the record, however, does not establish that the petitioner has distinguished himself as an supervising animator to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates

that the petitioner shows talent as a professional animator, but is not persuasive that the petitioner's achievements set him significantly above others in his field. It has not been shown that the petitioner's entry would substantially benefit prospectively the United States. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the decision of the director will be affirmed and the petition will be denied.

ORDER: The Associate Commissioner's decision of October 12, 1999 is withdrawn. The decision of the director dated July 21, 1998 is affirmed. The petition is denied.